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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-854

PROVIDENCE HOSPITAL,
Petitioner,

versus

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS-MORSE, INC.,
Respondents.

REPLY BRIEF OF PROVIDENCE HOSPITAL TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities ii

Introduction 1

Argument

I. The Fifth Circuit Erroneously Held That The Federal Arbitration Act Preempted State Law and Limited Contractual Arbitration Rights 3

II. The Fifth Circuit Erroneously Held That The Federal Arbitration Act Limited Contractual Arbitration Rights To A Stay Of Pending Litigation For Arbitration 7

A. The Fifth Circuit Held Providence's Sole Right Under The Contractual Arbitration Provisions To Be To Timely Move For A Stay Pending Arbitration 7

B. The Contractual Arbitration Provisions Established Rights Not Limited To A Stay Pending Arbitration 9

C. The Fifth Circuit Ignored The Contractual Right To Have Questions Initially Decided By The Architect 11

D. The Fifth Circuit Ignored The Contractual Right To Finality Of The Initial Decision If Not Promptly Appealed 13

TABLE OF CONTENTS (Continued)

Page

E. The Fifth Circuit Ignored The Contract Provision That Second-Step Arbitration Is A Prerequisite To Litigation Of Contract Claims 13

F. The Fifth Circuit Erroneously Held That Motions To Dismiss Did Not Adequately Raise Contractual Arbitration Rights 15

G. The Fifth Circuit Erroneously Considered All Arbitration Rights To Be Waived For All Matters (Even Those Not Yet Raised) By Defense Of Any Claim 18

1. The Fifth Circuit held that litigation waived all contractual arbitration rights 18

2. Litigation against non-parties to the arbitration agreement did not waive arbitration 19

3. Defense not inconsistent with arbitration after motion to dismiss or stay was denied, did not waive arbitration rights 20

4. The defense of the emergency generator claims did not waive arbitration rights with respect to claims first raised later 21

Conclusion 22

Proof of Service 24

TABLE OF CONTENTS (Continued)

Appendices Page

United States Code, Title 9, §10 ..... 88a

Excerpts from the Record 89a

Legislative history of the Federal Arbitration Act

H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) 96a

S. Rep. No. 536, 68th Cong. 1st Sess., 1924 ..... 99a

TABLE OF AUTHORITIES

Cases

American Locomotive Co. v. Chemical Research Corp., 171 F.2d 115 (6th Cir. 1948), cert. denied 336 U.S. 909 18

American Locomotive Co. v. Gyro-Process Co., 185 F.2d 316 (6th Cir. 1950) 18

Belk v. Allied Aviation Service Co. of New Jersey, Inc., 315 F.2d 513 (2d Cir. 1963), cert. denied 375 U.S. 847 16

Bernhardt v. Polygraphic Company of America, 350 U.S. 198 5,12

Blake Construction Co. v. United States, 252 F.2d 658 (5th Cir. 1958) 17

Burgess Const. Co. v. M. Morrin & Son Co., Inc., 526 F.2d 108 (10th Cir. 1975) 11

Cornell & Co. v. Barber & Ross Co., 242 F.Supp. 825, aff'd 360 F.2d 512 (D.C. Cir. 1966) 17

TABLE OF AUTHORITIES (Continued)

Page

Crown Coat Front Co. v. United States, 386 U.S. 503 15

E. H. Marhoefer, Jr., Co. v. Mount Sinai, Inc., 190 F.Supp. 355 (E.D. Wisc. 1961) 13

Germany v. River Terminal Ry. Co., 477 F.2d 546 (6th Cir. 1973) 15-16

La Nacional Platanera, S.C.L. v. North American F. & S.S. Corp., 84 F.2d 881 (5th Cir. 1936) 17

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 4,5,10

Radiator Specialty Co. v. Cannon Mills, Inc., 97 F.2d 318 (4th Cir. 1938) 17

Republic Steel Corp. v. Maddox, 275 Ala. 685 (1963), reversed 379 U.S. 650 4

Republic Steel Corp. v. Maddox, 379 U.S. 650, reversing 275 Ala. 685 16

Shanferoke C. & S. Corp. v. Westchester S. Corp., 293 U.S. 449 17

Sims v. City of Birmingham, 254 Ala. 598 (1950) 3,14

Southeastern Enameling Corp. v. General Bronze Corp., 434 F.2d 330 (5th Cir. 1970) ... 14,15

Stokes v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 523 F.2d 433 (6th Cir. 1975) 4,5

Transcontinental & Western Air v. Koppal, 345 U.S. 653 5,6

TABLE OF AUTHORITIES (Continued)

Page

United States v. Anthony Grace & Sons, Inc., 384 U.S. 424 14

United States v. Blair, 321 U.S. 730 12,13,14

United States v. Callahan Walker Const. Co., 317 U.S. 56 12

United States v. Joseph A. Holpuch Co., 328 U.S. 234 12,14

Wilder v. Crook, 250 Ala. 424 (1948) 11,13

Statutes and Rules

Federal Arbitration Act of 1925, 9 U.S.C. §1, et seq. 1

Federal Arbitration Act of 1925, 9 U.S.C. §§3 .8-9,18

Federal Arbitration Act of 1925, 9 U.S.C. §4 ... 10,18

Federal Arbitration Act of 1925, 9 U.S.C. §10 .. 13,15

Rule 52(a) Federal Rules of Civil Procedure ... 11

Other Authorities

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1924 6

S. Rep. No. 536, 68th Cong. 1st Sess. 1924 14

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REPLY BRIEF OF PROVIDENCE HOSPITAL TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

This case is important because the Fifth Circuit mishandled several questions pertinent to thousands of private contracts, including many contracts for hospital construction which contain identical General Conditions developed by the U. S. Public Health Service. These errors apparently stem from a judicial distrust of contractual arbitration and limitation of remedies, and a reluctance to accept the policy of the Federal Arbitration Act of 1925, 9 U.S.C. §§ 1 *et seq.*

First, the Fifth Circuit ignored state law pertinent to the enforcement of contractual dispute settlement provisions, holding that the arbitration issues were controlled solely by federal law. Alabama substantive law, which favors enforcement of contractual arbitration, as well as that of many other states, is not inconsistent with the Federal Arbitration Act, and the Fifth Circuit erred in holding such state law to be preempted.

Second, the Fifth Circuit, as well as the District Court, gave no deference to the unappealed decision of the architect as the first step of a two-step arbitration process. Thousands of contracts contain two-step arbitration procedures, and the refusal (without discussion) to defer to the unappealed first-step decision with respect to the claims in this case jeopardizes innumerable similar first-step decisions in other contracts.

Third, the Fifth Circuit, as well as the District Court, ignored contractual language that second-step arbitration was a condition precedent to suit. Such language also is common and enforceable under federal law as well as the law of Alabama and several other states, and should have been enforced in this case.

Fourth, the Fifth Circuit and the District Court treated default in proceeding to arbitration with respect to one issue as waiver of all arbitration with respect to every other issue, arising before or after the default.

Fifth, the Fifth Circuit reversed without discussion the District Court's denial of monetary damages,

although the contract contained a common "no damage" clause which could have been (and was) construed by the District Court to preclude monetary damages.

The General Conditions of the contract at issue provide for a detailed private dispute settlement procedure as well as exclusive remedies. Such provisions are common, and Alabama law, as well as federal law, enforces the provisions in question. The reluctance of the Fifth Circuit to enforce these provisions is inconsistent with the Federal Arbitration Act, and is a matter of substantial importance because similar provisions occur almost universally in construction contracts and commonly in other contracts.

I. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT THE FEDERAL ARBITRATION ACT PREEMPTED STATE LAW AND LIMITED CONTRACTUAL ARBITRATION RIGHTS.

In this diversity action, Providence's contractual arbitration rights depended in part upon the law of Alabama, and in part upon the Federal Arbitration Act. Under Alabama law, a contractual agreement that arbitration is a condition precedent to suit, is enforceable. *Sims v. City of Birmingham*, 254 Ala. 598, 610 (1950). Alabama likewise recognizes and enforces the requirement that administrative remedies (including contractual arbitration) must be exhausted, or an excuse for failure to exhaust such remedies established, before relief is available in the courts. See

Republic Steel Corp. v. Maddox, 275 Ala. 685 (1963), reversed on other grounds 379 U.S. 650.

Providence repeatedly and vigorously asserted substantive rights under Alabama law and the arbitration and contractual remedy provisions of the Providence - Manhattan contract, discussed at pp. 7-18 below, to have Manhattan's cross-claims dismissed, not merely stayed for belated arbitration.

The Fifth Circuit recognized the applicability of the Federal Arbitration Act, but treated the Federal Arbitration Act as preempting Alabama state law governing Providence's contractual rights (Decision, Petition App. 25a).[1] The Ernst Brief argues at page 6, and Manhattan implicitly concurs, that "Providence's citation of Alabama state law is entirely inapposite" because the Fifth Circuit correctly held that the Federal Arbitration Act preempted state law which would have precluded Manhattan's claims against Providence in this diversity action.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, and *Stokes v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433 (6th Cir. 1975), cited by the Fifth Circuit and the Ernst Brief, deal with the preemp-

1 The decision of the District Court is reproduced in the Appendix to the Petition for Certiorari, and is cited herein as "Finding ___" or "Conclusion ___, Petition App. ___". The initial decision of the Fifth Circuit is cited herein as "Decision, Petition App. ___"; the opinion of the Fifth Circuit on rehearing is cited herein "Opinion on Reh., Petition App. ___". The Record is cited "R. ___"; the Appendix on appeal is cited "A. ___". The pages of the Appendix to this response are numbered beginning after the last page of the Petition Appendix.

tion of state law inconsistent with the granting of a stay under 9 U.S.C. §3. Neither *Prima Paint* nor *Stokes* held that 9 U.S.C. §3 preempted state substantive law concerning enforcement of arbitration as a condition precedent to suit, or enforcement of a first-step arbitration decision, which are consistent with "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts," recognized in *Prima Paint*, 388 U.S. 395, 404.

The question in this case may be stated:

> Whether in a diversity action for breach of contract subject to the provisions of the Federal Arbitration Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action.

Alabama law that the failure to exhaust administrative remedies (such as contractual arbitration) would subject Manhattan's claims to dismissal, is consistent with the Federal Arbitration Act and its underlying policy; the Fifth Circuit erred in considering such Alabama law preempted. The continuing vitality of state law concerning arbitration in diversity cases was established in *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198.

In *Transcontinental & Western Air v. Koppal*, 345 U.S. 653, this Court granted certiorari for questions related to alleged preemption of state law governing

the right to bring an action. The first question in *Koppal* was:

> Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action. 345 U.S. 653, 656.

The holding of the Fifth Circuit that Providence's sole contractual arbitration right was to a stay, and that Providence's motions to dismiss (and defense after the motions were denied) waived that right, raises a preemption question similar to that which this Court faced in *Koppal*.

The legislative history of the Federal Arbitration Act makes it clear that the Act was intended to encourage enforcement of contractual arbitration agreements, not to preempt state law requiring exhaustion of contract remedies such as arbitration. H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) (App. 96a hereto) sets out the intent of the Federal Arbitration act to make contractual arbitration agreements enforceable, rather than to abrogate state law which fostered enforcement of contractual arbitration agreements:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement.

The Fifth Circuit's holding that Providence's exclusive right was the federal right to a stay is inconsistent with the intent of the Federal Arbitration Act, to make contractual provisions concerning arbitration enforceable. Dismissal of Manhattan's cross-claims against Providence, as required by Alabama law, would enforce the arbitration agreement of the parties by preventing litigation in violation of the contractual commitment to arbitration. The policy of the Federal Arbitration Act is consistent with the law of Alabama, and inconsistent with the preemption of Alabama law which is a necessary element of the Fifth Circuit's decision.

II. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT THE FEDERAL ARBITRATION ACT LIMITED CONTRACTUAL ARBITRATION RIGHTS TO A STAY OF PENDING LITIGATION FOR ARBITRATION.

A. The Fifth Circuit Held Providence's Sole Right Under The Contractual Arbitration Provisions To Be To Timely Move For A Stay Pending Arbitration.

The Federal Arbitration Act provides that a party such as Providence may move for a stay in favor of contractual arbitration. When this litigation commenced, Providence moved to dismiss or to stay the claims of Ernst (with whom Providence had no con-

tractual arbitration) and Manhattan (with whom Providence had contractual arbitration).[2]

The Fifth Circuit held that the initial motion of Providence to dismiss or to stay the action did not properly invoke the Federal Arbitration Act, because Providence's motion to stay was not specifically for arbitration. (Decision, Petition App. 26a).[3]

The analysis of the Fifth Circuit, which the Manhattan Brief and the Ernst Brief adopt and exaggerate,[4] is that the sole question concerning the arbitration provisions of the Providence - Manhattan contract is whether Providence waived the right to a stay by failure to demand arbitration. This analysis depends upon four misconceptions: first, that the Federal Arbitration Act preempted state law which gave Providence contractual rights not limited solely to a stay for arbitration; second, that Providence's only contractual arbitration right under federal law was a 9

2 As set out in the Providence petition for certiorari at pp. 5-6, the December 17, 1970, brief in support of that motion to dismiss or to stay raised the arbitration provisions of the contract between Manhattan and Providence (Petition App. 70a-72a).

3 Whether or not most appropriate, the motion to dismiss should have been procedurally sufficient, as set out at p. 15-18 below.

4 The Ernst Brief accuses Providence of untruthfully suggesting that "Providence ... intended to proceed to arbitration." Providence did not assert any intention to arbitrate belatedly; Providence sought, and seeks, to assert its contract rights *not* to be subjected to this litigation (or belated arbitration) over Manhattan's contract claims concerning the sewage ejection and Palco bedlight fixture problems which had been previously decided by the architect and which Manhattan had not timely appealed to arbitration. Providence did, however, move for a stay concerning the delay in releasing operating rooms, on which the architect's representative ruled adversely to Providence for the first time (A. 442-45) during trial (A. 400). The motion was summarily denied. (A. 401).

U.S.C. §3 stay; third, that Providence's litigation in defense of Manhattan's claims after Providence's motions to dismiss were denied, or Providence's litigation against parties other than Manhattan, with whom Providence had no arbitration agreement, waived Providence's rights with respect to claims by Manhattan; and fourth, that waiver of arbitration with respect to one matter waived arbitration with respect to all matters.

B. The Contractual Arbitration Provisions Established Rights Not Limited To A Stay Pending Arbitration.

The Providence - Manhattan contract provided that, in the event of delay allegedly caused by Providence as the owner, Manhattan could request an extension of the contract time under Paragraph 31(c) of the General Conditions (Petition App. 5a-6a). Manhattan requested such an extension of the contract time with respect to the claims which are the subject of the Petition for Certiorari, the sewage ejection problem and the Palco bedlight fixture problem. Under the General Conditions, the architect is to interpret the contract documents, and is to make findings with respect to requested extensions of time under Paragraph 31(c); the requests by Manhattan were denied concerning the sewage ejection problem (Finding 24, Petition App. 44a) and the Palco bedlight fixture problem (Finding 49, Petition App. 49a). Under Paragraph 31(c), the findings of the architect are "final and conclusive . . . subject only to arbitration, as specified herein"; and Paragraph 7 of the General Conditions provides that

the demand for arbitration shall be made "within thirty days after the dispute has arisen if practicable . . ." (Petition App. 3a). No such demand was made with respect to the sewage ejection problem[5] or the Palco bedlight fixture problem.[6] Arbitration is "a prior condition to any right of legal action . . ." by Providence or Manhattan under the Providence - Manhattan contract (General Conditions ¶ 7(a), Petition App. 2a).

At the time of the filing of this action, the thirty day period within which the architect's decision concerning the sewage ejection or Palco bedlight fixture problems could have been appealed to arbitration, had long since run; and no evidence was offered at any time that appeal within thirty days was not practicable. Provi-

5 No party ever raised any claim concerning the sewage ejection problem in any pleading prior to trial in 1973; Manhattan *first* raised its sewage ejection problem claim on the fourteenth day of trial (R. 2134-36, App. 90a-92a hereto). Providence objected to the line of questioning, raising the finality of the architect's decision and the lack of any timely appeal to arbitration of the sewage ejection problem (R. 2140, App. 92a hereto); the objection was overruled (R. 2141, App. 92a-93a hereto).

6 Manhattan incorrectly alleged in amended cross-claims (A. 94-98) that a demand by Manhattan for arbitration of the emergency generator problem and the Palco bedlight fixture problem had been refused by Providence. At trial, Manhattan's attorney stipulated that no such demand was ever made to Providence (R. 1682-83, App. 89a hereto) and the Fifth Circuit found that there was no evidence that any demand for arbitration was ever executed (Decision, Petition App. 26a, Fn. 38; see also R. 1836, App. 89a hereto). Under Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, such an allegation that Providence refused to arbitrate matters arbitrable under the contract, should have required the District Court to order arbitration to proceed under 9 U.S.C. §4, 388 U.S. 395, 400. Manhattan never alleged any arbitration demand with respect to the sewage ejection problem.

dence's rights under the contract,[7] therefore, with respect to the sewage ejection and Palco bedlight fixture problems were (1) to have the question of whether any delay was caused by Providence decided *by the architect;* (2) to have the benefit of the finality and conclusiveness of the initial decision of the architect if no timely appeal were taken to arbitration; and (3) not to be subjected to litigation unless and until the "prior condition" of submission of the matter to arbitrators had been satisfied.

C. The Fifth Circuit Ignored The Contractual Right To Have Questions Initially Decided By The Architect.

Decision of questions concerning requests for extensions of time *by the architect* is a contract right of Providence. The decision of the architect is first-step arbitration in a two-step arbitration procedure. See *Wilder v. Crook*, 250 Ala. 424 (1948).

This Court enforced a similar contractual provision that disputes should be decided by a government contracting officer or his representative, subject to

7 The above discussion concerns the arbitration issues. ¶ 31(c) of the Providence - Manhattan contract was construed by the District Court as a "no damage" clause, precluding Manhattan from claiming delay damages against Providence. Manhattan and Ernst suggest that the District Court made no such implicit finding; however, the finding is inherent in the granting of time extensions (and relief from liquidated damages) to Manhattan on account of delays caused by Providence (Conclusion 5, Petition App. 67a), but denying Manhattan's claims for damages from such delays. (Conclusion 13, Petition App. 68a). The conflict with Burgess Const. Co. v. M. Morrin & Son Co., Inc., 526 F.2d 108 (10th Cir. 1975), arises from the reversal by the Fifth Circuit of the District Court's denial of damages (implicitly based on ¶ 31(c)) without discussion and without Rule 52(a) F.R.Civ.P. deference.

appeal as provided by contract, in *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234; *United States v. Callahan Walker Const. Co.*, 317 U.S. 56, and *United States v. Blair*, 321 U.S. 730. As this Court has recognized, the decision of disputes by particular informed parties is one of the strong policies underlying arbitration. See *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 203:

> The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.

The resolution of such disputes by the architect, who is not only qualified by training and experience to make such determinations, but also familiar with the construction project from which the dispute arose, is consistent with the policy favoring arbitration. As the District Judge recognized, the District Judge had neither the experience nor the initial familiarity with the construction project to enable him to make such decisions (Finding 7, Petition App. 37a-38a).

The sewage ejection problem and the Palco bedlight fixtures problem each had been presented by Manhattan to the architect, as claims for extensions of time under Paragraph 31(c) of the General Conditions. The architect denied those extensions, and Providence is entitled under its contract for those decisions to be given effect. The District Court gave no deference to the architect's decisions, and reversed the architect's decisions on the sewage ejection and Palco bedlight

fixture problems although the architect's decision was, in effect, first-step arbitration subject to 9 U.S.C. §10. See *E. H. Marhoefer, Jr., Co. v. Mount Sinai, Inc.*, 190 F.Supp. 355, 360 (E.D. Wisc. 1961); *Wilder v. Crook*, 250 Ala. 424 (1948).

D. The Fifth Circuit Ignored The Contractual Right To Finality Of The Initial Decision If Not Promptly Appealed.

Providence, moreover, was entitled to the benefit of the finality and conclusiveness of the decisions denying requests for extensions of time concerning the sewage ejection problem and the Palco bedlight fixture problem, each of which had arisen more than a year prior to the bringing of this action. Timely arbitration would have allowed arbitrators to visit the project before the state of the work changed. The passage of time made it difficult (if not impossible) to duplicate the evidence which was presented to the architect or which could have been presented to arbitration, had arbitration been timely sought. When no arbitration was sought, the decision of the architect became final, and Providence was entitled not to be compelled after an unreasonable delay to relitigate disputes concerning the sewage ejection and Palco bedlight fixture problems. See *United States v. Blair*, 321 U.S. 730, 735, disapproving delay which allowed damages to accumulate.

E. The Fifth Circuit Ignored The Contract Provision That Second-Step Arbitration Is A Prerequisite To Litigation Of Contract Claims.

Providence also had the right to have any appeal from the initial decisions of the architect with respect to the sewage ejection and Palco bedlight fixture problems, presented to arbitrators rather than a judge. Reference to arbitrators with construction industry expertise, whose experience well suits them to make decisions in such matters, is an element of the policy favoring arbitration. When parties contractually agree, as Providence and Manhattan did, to whom appeals from the decision of the architect shall be presented, such a provision should be enforced. *United States v. Blair*, 321 U.S. 730. The "practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into," is a major consideration underlying the Federal Arbitration Act. S. Rep. No. 536, 68th Cong. 1st. Sess., 1924. (App. 99a, 105a hereto).

The "prior condition" provision of the Providence - Manhattan contract entitled Providence not to be subjected to litigation concerning the sewage ejection and Palco bedlight fixture problems unless and until arbitrators had decided the matter in accordance with the contract. Under Alabama law, such a provision is enforceable, *Sims v. City of Birmingham*, 254 Ala. 598, 610 (1950), and the same is true under federal law. *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234; see also *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424; and *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330 (5th Cir. 1970), in which "condition precedent" language, asserted as a defense, entitled the defendant to a stay.

Had the matter been submitted to arbitrators, the decision of the arbitrators might have differed from

that of the District Court, and the review of the arbitrators' decision should have been governed by the standards for enforcement of arbitration awards under 9 U.S.C. §10, rather than determined *de novo* as the District Court did. Compare *Crown Coat Front Co. v. United States*, 386 U.S. 503.

F. The Fifth Circuit Erroneously Held That Motions To Dismiss Did Not Adequately Raise Contractual Arbitration Rights.

The Federal Arbitration Act recognizes that a party may be in default, and not entitled to a stay pending arbitration; but it is inconsistent with the policy of the Federal Arbitration Act that default be lightly inferred.

Under the Federal Rules of Civil Procedure, Providence was entitled to whatever relief was proper, whether or not articulately pled; the motion to dismiss or to stay, whether or not the most appropriate vehicle, should have been procedurally sufficient to invoke Providence's rights under the contractual arbitration provisions. Providence thereafter moved to dismiss Manhattan's numerous amended cross-claims and set up the contractual arbitration provisions as defenses. See *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330 (5th Cir. 1970), granting a stay where arbitration was raised as a defense.

The conflict with the decision of the Sixth Circuit in *Germany v. River Terminal Ry. Co.*, 477 F.2d 546 (6th

Cir. 1973), which the Manhattan Brief and the Ernst Brief misconstrue, is that in *Germany*, arbitration was raised in the same fashion as in this case — "in a tendered amendment to a pleading in support of its position that the cross-claim of N & W *failed to state a claim upon which relief could be granted.*" (italics ours) 477 F.2d 546, 457. Providence offered the General Conditions as an attachment to the first Providence motion to dismiss Manhattan's cross-claim for failure to state a claim upon which relief could be granted; the arbitration provisions were specifically identified in the supporting brief (Petition App. 70a-72a). In *Germany*, such presentation in support of *dismissal* was sufficient to raise arbitration, and *did not* constitute default or waiver, although the party even sought to "abandon its request for arbitration" on appeal. 477 F.2d 546, 548.

A stay is not the sole remedy of a party sued in violation of a contractual commitment to arbitrate. In *Republic Steel Corp. v. Maddox*, 379 U.S. 650, reversing 275 Ala. 685 (1963), this Court reversed judgment for the plaintiff simply because the contractual prerequisite to suit, arbitration, had not been satisfied. In effect, this court in *Maddox* granted dismissal of the plaintiff's claim rather than a stay for belated arbitration. See also *Belk v. Allied Aviation Service Co. of New Jersey, Inc.*, 315 F.2d 513 (2d Cir. 1963), cert. denied 375 U.S. 847. If, as here, arbitration of the claims in question is barred by the failure of the aggrieved party (Manhattan) to timely appeal to arbitration, dismissal rather than stay is appropriate.

Providence did not demand arbitration of the sewage ejection and Palco bedlight fixture problems, because

the initial decisions had been in favor of Providence, such decisions had become final and conclusive by failure of Manhattan to timely demand arbitration (or to offer any excuse for delay), and Providence sought no relief from Manhattan other than to be relieved of Manhattan's litigation for the failure of Manhattan to satisfy its contractual obligations. See *Shanferoke C. & S. Corp. v. Westchester S. Corp.*, 293 U.S. 449, 453-54, adopting the reasoning of the Second Circuit below (70 F.2d 297 at 299) that a defendant "contented" with the decision of the plaintiff prior to suit not to proceed to arbitration, did not waive arbitration by failure to demand arbitration.

Manhattan cited several cases in which a party's delay in asserting its arbitration rights and conduct inconsistent with contractual arbitration provisions was held to constitute default which precluded a stay.[8]

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8 In Blake Construction Co. v. United States, 252 F.2d 658 (5th Cir. 1958), the defendant was in default by raising arbitration "for the first time as the actual trial got under way" 252 F.2d 658, 662.

In Cornell & Co. v. Barber & Ross Co., 242 F.Supp. 825, aff'd 360 F.2d 512 (D.C. Cir. 1966), the defendant moved for transfer of venue, answered, and counterclaimed without reference to arbitration before filing the motion to stay.

In La Nacional Platanera, S.C.L. v. North American F. & S.S. Corp., 84 F.2d 881 (5th Cir. 1936), a *plaintiff* was held in default by delaying more than three years after filing the complaint to move for a stay.

In Radiator Specialty Co. v. Cannon Mills, Inc., 97 F.2d 318 (4th Cir. 1938), a motion to stay was filed on the day agreed for trial, after an answer, a counterclaim, and several months of proceedings.

These cases are not inconsistent with the assertion of contract rights *other than to a stay*, because they each dealt with the untimeliness of a stay where the party did not raise arbitration in its initial pleading, and acted by litigating in a fashion inconsistent with the contractual arbitration provisions. Providence raised arbitration as a bar to the action in its initial response to Manhattan's claims, and asserted rights in addition to a stay.

Providence does not now seek any such untimely stay; Providence asserts contractual rights from the arbitration provisions other than for a stay.

G. The Fifth Circuit Erroneously Considered All Arbitration Rights To Be Waived For All Matters (Even Those Not Yet Raised) By Defense Of Any Claim.

1. *The Fifth Circuit held that litigation waived all contractual arbitration rights.*

The Fifth Circuit, in its initial decision, found that Providence's "pre- and post-suit behavior" waived arbitration.[9] The "pre-suit behavior" was the telephone

The *American Locomotive* cases (American Locomotive Co. v. Chemical Research Corp., 171 F.2d 115 (6th Cir. 1948), cert. denied 336 U.S. 909, [*American Locomotive I*] and American Locomotive Co. v. Gyro-Process Co., 185 F.2d 316 (6th Cir. 1950) [*American Locomotive II*], involved a dispute in which American Locomotive was sued for breach of a contract providing for arbitration; American Locomotive raised arbitration as a defense in *American Locomotive I*, and also filed a counterclaim, but did not move for a stay until almost eight years after the filing of the complaint. American Locomotive was held in default, and the stay denied. In *American Locomotive II*, American Locomotive sought an order referring the same dispute to arbitration under 9 U.S.C. §4, and this also was denied. The issue decided by the Sixth Circuit in the American Locomotive cases is simply whether stay (under 9 U.S.C. §3), or an order (under 9 U.S.C. §4), for arbitration, was proper; the question of defenses based on the contractual arbitration provisions was not considered, nor is it clear whether the contract gave American Locomotive the same rights as the Providence — Manhattan contract gives Providence.

9 The Manhattan Brief at pp. 4-5 refers to the holding of waiver in view of "*pre- and post-suit behavior*" (Manhattan's italics) but does not acknowledge that the Fifth Circuit withdrew on rehearing the suggestion that *pre-suit* behavior by Providence (the Kilborn telephone call) was pertinent to waiver. The Statement of Facts in

call from Providence's now deceased attorney, Vincent Kilborn, to an employee of the State Department of Public Health concerning the emergency generator problem, recorded in Ernst Ex. 268.[10]

The Fifth Circuit, on rehearing, retreated from its holding of "pre-suit" waiver by Providence but held that Providence's extensive litigation against Manhattan, and against parties other than Manhattan, was the "essence" of waiver (Opinion on Reh., Petition App. 31a-32a) apparently on the grounds that Providence's litigation against parties other than Manhattan is somehow pertinent to waiver of rights against Manhattan, and that Providence prejudiced Manhattan by defending Manhattan's claims.

2. *Litigation against non-parties to the arbitration agreement did not waive arbitration.*

The analysis of the Fifth Circuit is defective, in that Providence merely defended Manhattan's claims after

the Manhattan Brief is misleading in that it paraphrases Finding 126 of the District Court (Petition App. 65a) "In fact, Providence at one time, stated that if Manhattan should persist in its efforts to arbitrate, Providence would prevent same by filing a law suit." (Manhattan Brief, p. 3). As the Fifth Circuit recognized on rehearing (Opinion on Reh., Petition App. 31a-32a), that reference was to the Kilborn telephone conversation prior to the litigation, and was neither communicated to, nor relied upon, by any party. Manhattan's "efforts to arbitrate", if any, stopped short of ever demanding arbitration of *any* matter.

10 The Ernst Brief cites Ernst Ex. 268 and R. 2850-53 (App. 93a-96a hereto) in support of the misstatement at page 4 that Providence "boldly proclaimed" that Providence would oppose arbitration in court if "Ernst or any other party attempted to go to arbitration to resolve disputes which were pending and which became central issues in this suit . . ." The only party referred to in Ernst Ex. 268 was "the contractor", Manhattan, and the only issue was the emergency generator problem. The record citation given by Ernst (R. 2850-53, App. 93a-96a hereto) is to the reading of Ernst Ex. 268 into the record by Arthur Friedman, attorney for Ernst.

Providence's motion to dismiss or to stay was denied, and Providence asserted no claim against any party which could have been submitted to arbitration. The claims of Providence against Fairbanks, Ernst, or McCauley, were not subject to arbitration under the terms of the General Conditions of the Providence - Manhattan contract, because neither McCauley, Ernst, nor Fairbanks, was a party to the Providence - Manhattan contract.

Providence was not in default of any arbitration commitment with respect to McCauley, Ernst, or Fairbanks. The suggestion of the Ernst Brief that Ernst (or Manhattan) was somehow unfairly prejudiced by Providence's litigation against Ernst, is a red herring with respect to whether Providence waived contractual arbitration rights as to disputes that Providence had *with Manhattan.*

3. *Defense not inconsistent with arbitration after motion to dismiss or stay was denied, did not waive arbitration rights.*

Providence made no claim, cross-claim, or counterclaim against Manhattan which was inconsistent with Providence's contractual commitment to arbitrate, or which constituted default in seeking arbitration with respect to Manhattan, because Providence made no such claim against Manhattan at all. The only claim on behalf of Providence against Manhattan was framed by the District Court-*sua sponte* (Finding 11 I, Petition App. 41a). Such action of the District Court cannot be construed (as the Ernst Brief apparently

suggests it can) as a breach by Providence of the arbitration provisions of the Providence - Manhattan contract. Providence repeatedly moved to dismiss Manhattan's claims on several grounds, including the contractual arbitration provisions, and Providence *defended* Manhattan's claims *after* Providence's motions concerning arbitration were denied.

4. *The defense of the emergency generator claims did not waive arbitration rights with respect to claims first raised later.*

The sewage ejection problem arose early in the construction (November, 1968) and Manhattan requested an extension of time which was denied in May, 1969. For four years (from May, 1969, until first raised at trial in August, 1973), Manhattan never raised any claim concerning the sewage ejection problem either in arbitration or litigation.

The Fifth Circuit held that Providence, by defending Manhattan's other claims, likewise waived arbitration with respect to the sewage ejection problem. As to the sewage ejection problem, this confuses the sequence of events. Virtually all of Providence's "post-suit" litigation took place *prior* to Manhattan's sewage ejection claim, which was *first* raised on the fourteenth day of trial over Providence's objection (R. 2140-41, App. 92a-93a hereto). Providence's previous litigation in defense of Manhattan's other claims was not waiver or default of arbitration rights with respect to the unasserted sewage ejection claim, first raised at trial.

CONCLUSION

Manhattan and Ernst argue that the Fifth Circuit correctly held that the sole question concerning Providence's arbitration rights was whether Providence had waived its right to a stay under the Federal Arbitration Act by litigating without demanding arbitration.

Under Alabama law, Providence was entitled to dismissal of Manhattan's claims; but the Fifth Circuit held that Providence's sole right was to move for a stay under the Federal Arbitration Act, and that Providence's motions were insufficient to invoke that right.

The Fifth Circuit implicitly held that that Act preempted any contractual arbitration rights under state law, other than to seek a stay, and the Fifth Circuit held Providence waived its only federal contractual arbitration right, to a stay, by moving to dismiss Manhattan's cross-claims rather than by demanding a stay for untimely arbitration. The Fifth Circuit denied Providence the right to initial decision by the architect, the right to finality of the initial decision unless timely appealed, and the right not to be sued on any contract claim not previously decided by the arbitrators.

Providence did not want, at any time after Manhattan's cross-claims were raised, to go to arbitration on the emergency generator, sewage ejection, or Palco bedlight fixture problems;[11] Providence wanted to

11 The architect's representative during the trial (A. 442-45) decided a Manhattan claim concerning a different matter (the delay in releasing operating rooms) against Providence. Providence immediately moved for a stay (A. 400). The motion was summarily denied. (A. 401).

have Manhattan's claims against Providence dismissed, on the basis that the arbitration provisions of the Providence - Manhattan contract entitled Providence *not* to be subjected to suit.

After Providence's motions to dismiss were denied, Providence defended Manhattan's claims rather than demand belated arbitration. Manhattan and Ernst argue, and the Fifth Circuit held, that this defense "waived" all Providence's contractual arbitration rights. The issue for this Court is whether that interpretation of waiver, and the preemption of state law governing contractual arbitration rights, are correct.

Respectfully submitted,

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PROOF OF SERVICE

I, Willis C. Darby, Jr., attorney for Providence Hospital, the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of February, 1978, I served copies of the foregoing Reply Brief of Providence Hospital to Briefs in Opposition to Petition for Certiorari on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

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APPENDIX

UNITED STATES CODE
TITLE 9
ARBITRATION

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

July 30, 1947, c.392, 61 Stat. 672.

EXCERPTS FROM THE RECORD

[R. 1682]

* * *

MR. DARBY: I would like to object to that offer in as far as it would show that a demand was actually made and I would invite the stipulation from Mr. Thornton that Mr. Thornton never mailed the demand to the American Arbitration Association, that Manhattan never sent the man to

[R. 1683]

the American Arbitration Association. Can we have that stipulation, Mr. Thornton?

MR. THORNTON: I will stipulate that I didn't make the demand on the hospital.

* * *

[R. 1836]

MR. DARBY: Mr. Roberts, Mr. Thornton gave you a document that was entitled a Demand for the American Arbitration Association, did you submit that demand to the American Arbitration Association?

A I don't believe I did.

* * *

[R. 2134]

* * *

Q [By Mr. Thornton] Can you identify that document?

A [By Tom Roberts] It is a letter from myself to Charles H. McCauley and Associates attention, Mr. McCauley, dated May the 8th, 1969.

Q I would like to read that letter, Your Honor.

"Dear Mr. McCauley: We ask that you consider the delay involved due to the revision of the sewage ejection system as shown on drawings P-1, P-13 and P-14, dated 10-18-69, as the basis for extra

[2135]

compensation.

Last November, we were asked to submit a proposal for the revision of the sewer system in area "B", December 11, 1968, Sam T. Wallace submitted a breakdown to us that was in turn submitted to your office informally for examination. Later, Mr. Young of Evans and Young, reported that the breakdown was not correct based on his estimate of the proposed changes. The Sam P. Wallace proposal was resubmitted by Manhattan Construction Company February 21, 1969. We were notified March 25th, 1969, that this proposal was not accepted.

During this period (November 14, 1968 until March 25, 1969) the work scheduled for Build-

ing "B" was at a standstill, thus allowing the basement excavation to remain open one hundred and thirty-one calendar days.

We think the time delay can be absorbed since Building "B" is not as critical as Building "A" but that expenses incurred for pumping water from the excavation (an area approximately two hundred foot by fifty foot by ten feet deep) is justifiable as a claim for compensation.

We are fully aware that all of our expenses for this maintenance are not to be considered as,

[R. 2136]

in any case, we would have the basement excavation open for approximately thirty days. We are only asking that the owners share some portion of the expense incurred by the extended delay and ask that you give this problem your consideration and advise us of your opinion. Very truly yours, Manhattan Construction Company of Texas."

Now, Mr. Roberts, can you explain to the Court what the problem was with the sewage ejection system?

A Actually, the system is all right. It is installed as it was on the plans and specifications, someone, either in the architects or the owners office decided they wanted to make a change on it, we submitted, this indicates twice, but it was a continual submittal for several months back and forth trying to reach an amount of money that would be acceptable to the owner for the change. After we had actually delayed

that part of the work for a hundred thirty one days, they disapproved the change, not allowing for the change or the inconvenience.

* * *

[2140]

* * *

MR. DARBY: Your Honor, I object to this line of questioning until such time as Mr. Thornton has shown that he has some reason why Manhattan Construction Company did not use the machinery in the contract for bringing these issues up at the appropriate time.

Now, the contract provides that if he is dissatisfied with the decision of the arbitrator — not only the arbitrator, but of the architect, that he will take it to arbitration and it says within thirty days if at all practicable.

Now, if he wants to offer this evidence, I think

[R. 2141]

first he has to show it was without the arbitration provision of the contract, or, in the alternative, that he has a good reason for not having taken it within the thirty days. Had he done so, the arbitrator would have a construction expert that could have come up and looked at it. He is bringing it up at trial, although he has change order after change order that he has accepted. I think if he has an objection to one of them, he should have taken it up then, not now before Your Honor.

THE COURT: Overruled. Go ahead.

* * *

[R. 2850]

* * *

MR. FRIEDMAN: Now, the next exhibit is Ernst exhibit 263, which is a letter of March 30, 1970 from Manhattan to Braswell at McCauley. I don't propose to read any part of it.

Next, if Your Honor please, is Ernst exhibit 268 which I would like to read. It is a memorandum dated April 7, 1970 and it is from Author Joe Grant to Mr. Dean and the subject is Providence Hospital, Alabama 360.

> "Mr. Vince Kilborn, attorney of Mobile, representing Providence Hospital called this morning

[R. 2851]

> at ten thirty for the purpose of a personal chat regarding the generator at subject hospital. I told Mr. Kilborn that my position gave me no authority in this matter, though, I was aware of it and that Mr. Dean was the proper person to talk to."

If Your Honor please, I am reading this with the corrections made on the documents, the strike outs and handwritten notations.

> "He asked that we chat informally and he expressed concern regarding a letter from Mr.

Dean to the architect dated April 3, 1970. He stated that it imposed a responsibility on the architect (in the finding how specifications are not satisfied) that is not required under government contract law. I expressed a personal interest in his fact of the law but he did not elaborate rather he said that this was for someone elses lawyer to come up with.

He expressed concern that the state Department of Health if it did require this would put itself in a place of being a litigant which he did not wish to happen and he requested that the letter be withdrawn.

He pointed out that the architect turned down the Dorman engine in September of 1969. He further contends that by not requesting arbitration within the following six month period, the contractor waived

[R. 2852]

> his right for arbitration. He proposed that if they, at this point, requested arbitration, Providence Hospital would file a suit in Federal Court asking that arbitration be disallowed and that the contractor be required to furnish an engine meeting specifications.
>
> He would not discuss the matter regarding meeting specifications, although, he did mention that being foreign made could be a disqualifying factor even though other foreign made materials are possibly in the hospital.
>
> He also pointed out that the Providence

Hospital is also looking to the architect to protect them in the matter of not accepting a sub-standard generator. He pointed out that their information is that the Dorman engine has given trouble in a number of installations.

In response to my questions about the minutes from the contractor we received from a meeting held in Birmingham saying that the architect had accepted the generator. He noted that the notes were not admissable in Court.

In summary, Mr. Kilborn expressed the hope that the contractor will furnish a generator that will meet the specifications. At any rate, the next

step is up to the contractor. He, therefore, hopes that the State Health department will not intervene beyond its authority to ascertain if competitive bidding and prohibition against proprietary specifications are met."

And there is initials at the bottom A.J.G. and a date, April 6, 1970.

THE COURT: April 6.

MR. FRIEDMAN: Yes, Judge, the thing is dated April 7.

THE COURT: It says April 7.

MR. FRIEDMAN: The typewritten date on the first page is April 7.

THE COURT: All right. Go ahead.

H. R. Rep. No. 96, 68th Cong., 1st Sess. 1924

HOUSE OF REPRESENTATIVES

68th Congress } { Report
1st Session, } { No. 96.

TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION.

January 24, 1924. - Referred to the House Calendar and ordered to be printed.

MR. GRAHAM of Pennsylvania, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 646.]

The purpose of this bill is to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts. It was drafted by a committee of the American Bar Association and is sponsored by that association and by a large number of trade bodies whose representatives appeared before

the committee on the hearing. There was no opposition to the bill before the committee.

The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States. The remedy is founded also upon the Federal control over interstate commerce and over admiralty. The control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

The need for the law arises from an anachronism of our American laws, some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became

firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement. The procedure is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties. There is provided a method for the summary trial of any claim that no arbitration agreement ever was made, and there is also provided a hearing if the defeated party contends that the award was secured by fraud or other corruption or undue influence, or that some evident mistake not affecting the merits exists in the award. If the parties to the arbitration are willing to proceed under it, they need not resort to the courts at all. If one party is recalcitrant he can no longer escape his agreement, but his rights are amply protected. At the same time the party willing to perform his contract for arbitration is not subject to the delay and cost of litigation. Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court. The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form.

To secure jurisdiction for arbitration, however, service of process must be made personally, so that there

is no danger that a defendant, having an honest defense, will be called upon to defend his case at a distance under a disadvantage. The proceeding will be commenced practically as any action is now commenced in the Federal courts.

In view of the strong support of commercial and legal bodies, the entire lack of opposition before the committee, the obvious justice of the result sought to be attained, and the evident propriety and necessity of Federal action, we submit that the bill should become law. It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

S. Rep. No. 536, 68th Cong. 1st Sess., 1924

CALENDAR NO. 569

68th Congress, 1st Session } SENATE { Report No. 536

TO MAKE VALID AND ENFORCEABLE CERTAIN AGREEMENTS FOR ARBITRATION

May 14, 1924. — Ordered to be printed

MR. STERLING, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1005]

The Committee on the Judiciary, to whom was referred the bill (S. 1005) to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations, report the same back with certain amendments thereto and, as so amended, the committee recommend that the bill do pass.

The amendments are as follows:

In lines 6 and 7, page 1 of the bill, strike out the words "or interstate."

In line 6, section 2, page 2, strike out the words "contract or"; and in line 7, section 2, page 2, after the word "or" insert the words "a contract evidencing a"; and in line 9, on said page, strike out the words "between the parties."

In line 18, section 4, page 3, after the word "agreement" as it first occurs in said line, insert the following proviso:

> Provided, That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed.

On page 6, strike out section 8 of the bill.

Beginning with the word "That," in line 21 section 10, page 6, strike out all down to and including the word "attorneys" in line 25.

On page 10, strike out section 14 of the bill.

On page 11, strike out section 16 of the bill.

Beginning with section 9, renumber the sections following, as required by the striking out of certain designated sections.

* 5-17-24

The purpose of the bill is clearly set forth in section 2, which, as proposed to be amended, reads as follows:

> Sec. 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The "maritime transactions or contracts," to which the bill will apply, are defined in section 1. Likewise,

the definition of "commerce" in the same section, shows to what contracts in interstate or foreign commerce the bill will be applicable.

It is not contended that agreements to arbitrate have no validity whatever. A party may be liable in an action for damages for the breach of an executory agreement to arbitrate; or, if the agreement has been executed according to its terms and an award made, the appropriate action may be brought at law or in equity to enforce the award. Both maritime contracts or transactions and contracts involving interstate commerce are at least valid to this extent.

But it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such an agreement be ground for a stay of proceedings until arbitration was had. Further, the agreement was subject to revocation by either of the parties at any time before the award. With this as the state of the law, such agreements were in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy.

Until recently in England, and up to the present time in nearly, if not quite all, the States of the Union, such has been the law in regard to arbitration agreements. The Federal courts have in the main been governed by the same rules and, as a consequence, have denied relief to the parties seeking to compel the performance

of executory agreements to settle and determine disputes by arbitration. If the agreement to arbitrate is found in a maritime contract or transaction, no action in admiralty for specific performance will lie, for the simple reason that this court is without power to grant equitable relief.

Various reasons have been given for these ancient rules of English law, followed as they have been by our State and Federal courts. Among these reasons were, first, the expressed fear on the part of the courts that arbitration tribunals did not possess the means to give full or proper redress, and also the doubt they entertained as to their right to compel an unwilling party to submit his cause to such a tribunal, thus denying to him the right to submit the same to the ordinary courts of justice for hearing and determination. Second, the jealousy of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction. To what extent the second reason influenced the first may be difficult to say; but it is not unreasonable to suppose that a desire to retain, if not extend, their jurisdiction had much to do with inspiring the fear that arbitration tribunals could not do justice between the parties. And third, established precedent has had its large part of course in perpetuating the old rules long after the courts themselves could no longer see that they were founded in reason or justice.

It has been said that "arrangements for avoiding the delay and expense of litigation and referring a dispute to friends or neutral persons are a natural practice of which traces may be found in any state of society." The

desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals. The Arbitration Society of America, with offices in the city of New York, has, through its arbitration tribunal, settled more than 500 cases during its less than two years of existence. In the New York Times of May 11 is found a brief resume of the work accomplished. We quote the following:

> In contrast with the long time required by the courts with their congested calendars to settle a dispute, the records of the society show that the average arbitration required but a single hearing, and occupied but a few hours of the time of disputants, counsel, and witnesses. The cost to the disputants was said to be trifling as compared with the cost of litigation.
>
> Complicated controversies involving large sums of money, which, beyond a reasonable doubt, if taken to the courts would have been fought through years of costly litigation, have been legally determined in this tribunal whose only rule of procedure is the rule of common sense, in from two to three weeks, the report states, "and the specially significant thing — just as significant as the saving of time and money — is the fact that wide satisfaction has resulted from the procedure. Winners and losers alike bear

witness to this in letters on file at the office of the society."

The record made under the supervision of this society shows not only the great value of voluntary arbitrations but the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into.

The bill, while relating to maritime transactions and to contracts in interstate and foreign commerce, follows the lines of the New York arbitration law enacted in 1920, amended in 1921, and sustained by the decision of the Supreme Court of the United States in the matter of the Red Cross Line v. Atlantic Fruit Co., rendered February 18, 1924.

Reference has been made herein to the definitions contained in the first section of the bill. The second section is set forth in full.

Section 3 provides for a stay of proceedings and arbitration in any suit where it appears that the issue involved is referable to arbitration under the contract.

Section 4 provides a simple method for securing the performance of an arbitration agreement. The aggrieved party may apply to the proper district court on five days notice, and the court will order the party to proceed. The constitutional right to a jury trial is adequately safeguarded.

Section 5 provides for the manner of naming the arbitrators in case the parties have failed to name them.

Section 6 provides for expedition in the matter of the hearing of arbitration matters by the court.

Section 7 gives the arbitrators power to summon witnesses.

Section 9 protects libels and seizures of vessels in admiralty proceedings.

Section 10 provides for the entry of a judgment where the parties have agreed thereto and for determining the appropriate court.

Section 11 provides that an award may be vacated where it was procured by corruption, fraud, or undue means, or where there was partiality or corruption on the part of the arbitrators, or where they have been guilty of misconduct or have refused to hear evidence pertinent and material to the controversy, or have been guilty of any other misbehavior prejudicial to the rights of either party, or where they have exceeded their powers.

Section 12 gives power to the court to modify or correct the award where there was evident material miscalculation of figures, or evident material mistake in the description of any person, thing, or property, or where the arbitrators have made an award upon a matter not submitted to them, or where the award is imperfect in matter of form.